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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 394

In the Matter of the Application
of
KINGSLEY INTERNATIONAL PICTURES
CORPORATION,

Appellant,

For an Order Pursuant to Article 78 of the
Civil Practice Act

against

THE REGENTS OF THE UNIVERSITY OF THE
STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellees in the above entitled cause make this statement in opposition to appellant's statement as to jurisdiction herein, and further move to dismiss the appeal herein and to affirm:

I. Statement of Issue on Appeal.

The question sought to be presented in this appeal is appellant's claim that Sections 120 to and including 132 of the Education Law of the State of New York, providing

for the examination and licensing of motion picture films exhibited for profit, and for penalties in event of unlicensed exhibitions, violate the First and Fourteenth Amendments of the Constitution of the United States as constituting an unauthorized restraint of freedom of speech or of expression; that the term of the statute "immoral" is so vague and indefinite as to be unconstitutional.

These claims the appellees deny and the Court of Appeals of the State of New York in the opinion and order here challenged, determined the questions adversely to appellant.

The Court of Appeals, affirming the denial of a license to the film "Lady Chatterley's Lover", found that:

> "This denial was based upon sections 122 and 122-a of the Education Law which *require* the denial of a license to motion pictures which are immoral in that they '*portray* acts of sexual immorality * * * as desirable, acceptable or proper patterns of behavior'."

There is no doubt about the purpose for which these sections have been enacted by the Legislature. A society may properly seek to protect itself against the harmful effects of such films; it may reject them.

The Court further declared:

> "The vileness of the matter it seeks to reject is clear. It embraces not only films which are [illegible]ly suggestive and obscene, nor only those which are sexually suggestive and immoral in theme, but those which combine the two. The statutory rejection is aimed at those films which, not being satisfied with portraying scenes of rank obscenity, go further and recommend sexually immoral acts, thus portrayed in a manner appealing to the prurient interest, as proper conduct for the people of our State."

The Court of Appeals further found that "the standard [of immorality] under consideration here is as explicit and restrictive in its terms as words permit."

> "*We do not believe that a film which is rank pornography is objectionable simply because it excites a human appetite. Rather, the objection lies in the corrosive effect upon the public sense of sexual morality.* The principle which has always prompted the rejection of obscenity is the 'social interest in order and morality'. (*Chaplinsky* v. *New Hampshire*, 315 U. S. 566, 571-572, *supra; Beauharnais* v. *Illinois*, 343 U. S. 250, 256, 257, *supra.*)"

Such a film which flouts the basic principles of morality is not protected by the First Amendment.

II. Pertinent Statutes.

Education Law, Sections 122 and 122-a.

§ 122. Licenses

> "The director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected *in toto*."

§ 122-a. Definitions

> "1. For the purpose of section one hundred twenty-two of this chapter, the term 'immoral' and the phrase 'of such a character that its exhibition would tend to

corrupt morals' shall denote a motion picture film or part thereof, the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior. * * *"

See also Sections 129 and 131.

Section 122-a was enacted in *1954*. At the time of approving the amendment (Ch. 620, L. 1954) Governor Dewey wrote in part as follows:

"* * * Recent Supreme Court decisions have indicated that the term 'immoral' may not be sufficiently definite for constitutional purposes. The primary purpose of this bill is to define 'immoral' and 'tend to corrupt morals' in conformance with the apparent requirements of these cases. It does so by defining them in terms of 'sexual immorality.' The words selected for this definition are based on judicial opinions which have given exhaustive and reasoned treatment to the subject. * * *

"The language of the Supreme Court of the United States, in a recent opinion of this precise problem, should be noted: 'To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. *It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places.*' [Burstyn v. Wilson, 72 S. Ct. 777, 343 U. S. 495, at 502, 96 L. Ed. 1098.] So long as the State has the responsibility for interdicting motion pictures which transgress the bounds of decency, we have the responsibility of furnishing guide lines to the agency charged with enforcing the law. * * *" (Emphasis supplied)

III. The Story of the Film and History of Proceeding With Respect Thereto.

The major characters in the film "Lady Chatterley's Lover" are Lady Chatterley, her husband Sir Clifford Chatterley, who is crippled, her lover, Mellors, a gamekeeper of their estate, the wife of Mellors and the wife's lover. The story presents in great detail the love affair of Lady Chatterley and Mellors which occurs subsequent to but apparently not in compliance with Sir Clifford Chatterley's suggestion to her that in view of his war injury which left him impotent, she have a child by another man to provide him with an heir to his title and estate. As a result of the affair, Lady Chatterley becomes pregnant with Mellors' child and in the final scenes leaves her husband to join Mellors. There are several scenes of love making between Lady Chatterley and Mellors and between Mellors' wife and another man which are patently pornographic, immoral and obscene.

When the film was originally presented to the Motion Picture Division, the Division, after review, directed the elimination of three scenes as follows:

> "Reel 2D—Eliminate all views of Mellors and Lady Chatterley in cabin from point where they are seen lying on cot together, in a state of undress to end of sequence."
>
> "Reel 3D—Eliminate all views of Mellors caressing Lady Chatterley's buttock and all views of him unzipping her dress and caressing her bare back. Eliminate following spoken dialogue accompanying these actions:

'Mais tu es nue * * *	'But you're nude * * * you're
Tue es nue sous ta robe,	nude under your * * * dress,
et tu ne le disais pas	and you didn't say so * * *
Qu'est-ce que to as?'	What is it?' "

Eliminate accompanying English superimposed titles:

"'You have nothing on * * *'
'And you didn't say so * * *'
'What is it?'"

"REEL 4D—Eliminate entire sequence in Mellors' bedroom, showing Lady Chatterley and Mellors in bed, in a state of undress.

REASON: 'Immoral' within the intent of our law."

The petitioner appealed from the determination of the Division in this respect to the Regents. After review of the film by a Committee of the Board of Regents, the Committee rendered its opinion which held that the three sequences specifically referred to by the Division were immoral under Sections 122-122a and further, that the whole theme of the picture is immoral in that the theme is the presentation of adultery as a desirable, acceptable pattern of behavior and affirmed the determination of the Division.

The Board of Regents thereafter considered the recommendation of the Committee and voted that the determination denying the license for the motion picture be affirmed.

Thereafter, appellant instituted a proceeding in the courts. The Supreme Court of the State of New York, Appellate Division, Third Department annulled the determination of the Regents. The Court of Appeals of the State reversed and confirmed the decision of the Board of Regents.

IV. No New Federal Question is Presented by This Attempted Appeal.

This Court in its decisions relating to motion picture censorship, and in particular *Matter of Burstyn* v. *Wilson*, 343 U. S. 495, determined that certain language contained

in state statutes setting up a basis for censorship was too vague, viz., "sacrilegious" was too vague, "immoral" too vague, etc. See also *Commercial Pictures Corp.* v. *Regents*, 346 U. S. 587. Under these specific opinions the Court indicated that under a carefully drawn statute the State had the legal right to predetermine whether a motion picture satisfied the statute before licensing it.

Having this in mind, the Legislature of this State has recast the statute with respect to the definition of the word "immoral" in an attempt to clarify it. The express provisions of this new statute are set forth heretofore. The Regents have refused to license this picture on the ground that it is immoral on two specific points, viz., that certain scenes contained in the picture were clearly immoral and second that the whole theme of the picture is immoral in that adultery is presented as a desirable and acceptable pattern of behavior.

It is quite clear that the term "immoral" as used by them and by the Motion Picture Director which referred to "acts of sexual immorality, lewdness, etc.," as set forth in Section 122-a of the Education Law, would embrace within such use the term "obscenity." In other words, it is our position that this picture is obscene and that the Regents have so held. It is our position that the statute in referring to "*acts of sexual immorality*" is not so limited that it refers only to portrayal of the final act itself; that obscene (immoral) acts leading up to the same, come within the provisions of this statute and within the determination of this Court in exactly the same way as the final culmination of the act itself. There can be no doubt that these acts as portrayed come within that area. Not only are the acts involved obscene in themselves but they are immoral in that they occur between a married

woman and a man not her husband, and it is a fact which is not subject to any argument that the theme of the picture throughout presents the relationship between this man and the wife of another as, to quote the statutory language, "desirable, acceptable, proper patterns of behavior."

Under Section 122-a there is no longer room for the argument that the term "immoral" is too vague to present a valid standard. The Legislature has clearly said that when a film presents "adultery" (a well defined act) as desirable and acceptable it is immoral and should not be exhibited. The Legislature, acting within the scope of its power has thus sought to protect the body social from the clear and present danger of corruption by such exhibitions.

Appellant's characterization of the statutory language as "indefinite and vague" cannot make it so.

In this brief we have no intention of rehashing all the arguments which have been presented to this Court heretofore in dealing with motion picture censorship. There is no doubt that the Legislature in this State and the people of this State are for some type of pre-review of motion pictures in order that the vicious ones can be eliminated. In this particular case the Legislature by unanimous vote of everybody has declared that immoral pictures which the Legislature has attempted to define as immoral should not be licensed. So far as this particular picture is concerned we know of no clearer language which can be used than that upon which the Regents have based their decision. Certainly the picture depicts the course of conduct proscribed by the statute, certainly the picture depicts sexual relations which the statute decries.

The Courts of this State have reviewed the film and have found that it comes squarely within the condemnation of

the statute. It is not our understanding that such facts will be reviewed by this Court. The only remaining question is whether "freedom of speech" guarantees the right to exhibit such a film in defiance of the State statute.

As I have pointed out in earlier briefs, an attempt was made to repeal the motion picture law, itself, some years ago and every educational organization, church organization, public spirited organizations, such as the League of Women Voters, opposed the repeal. We believe under all the circumstances that the Courts should join with the Regents in discovering sound basis to uphold the act of the Legislature. While in every motion picture case which has come before this Court, the Court has been importuned to hold precensorship illegal, this Court has refused so to do. The law of the case, as we understand it, is that a properly drawn statute setting forth the standards which are understood by everybody is constitutional and that this Court has definitely so indicated. In any event, as far as this case is concerned, we have obscenity in the picture as well as the other standards coming under the term "immoral" as defined by the Legislature.

The Supreme Court of the United States in *Swearingen* v. *United States*, 161 U. S. 446, 451 said:

> "The words 'obscene,' 'lewd,' and 'lascivious,' as used in the statute, * * * signify *that form of immorality which has relation to sexual impurity*, and have the same meaning as is given them at common law in prosecutions for obscene libel. * * * [To fall into this category the subject matter must be] * * * of a lewd, lascivious and obscene tendency, calculated to corrupt and debauch the mind and morals of those into whose hands it might fall." (Emphasis supplied.)

This Court has clearly indicated in recent decisions that society is not powerless to protect itself from the degrada-

tion of lewd publications. In *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325, Mr. Justice Frankfurter said in the prevailing opinion (P. 440-441):

"* * * In an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as a postulate that 'the primary requirements of decency may be enforced against obscene publications.' Id. 283 U. S. at 716. And so our starting point is that New York can constitutionally convict appellants of keeping for sale the booklets incontestably found to be obscene. *Alberts* v. *California*, decided this day [1 L. ed. 2d 1498]. The immediate problem then is whether New York can adopt as an auxiliary means of dealing with such obscene merchandising the procedure of § 22-a. [New York Code of Criminal Procedure.]

"We need not linger over the suggestion that something can be drawn out of the Due Process Clause of the Fourteenth Amendment that restricts New York to the criminal process in seeking to protect its people against the dissemination of pornography. It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. * * * Just as *Near* v. *Minnesota*, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625, *supra*, one of the landmark opinions in shaping the constitutional protection of freedom of speech and of the press, left no doubts that 'Liberty of speech, and of the press, is also not an absolute right,' 283 U. S. at 708, it likewise made clear that 'the protection even as to previous restraint is not absolutely unlimited.' Id. 283 U. S. at 716. To be sure, the limitation is the exception; it is to be closely confined so as to preclude what may fairly be deemed licensing or censorship.

"The judicial angle of vision in testing the validity of a statute like § 22-a is 'the operation and effect of the statute in substance.' Id. 283 U. S. at 713. The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his sup-

> port of constitutionally protected liberties: 'What is needed,' writes Professor Paul Freund, 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.' The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 539. * * *"

In *Roth* vs. *United States*, 354 U. S. 476, in upholding the power of the State to control obscenity, this Court pointed out that the erection of rigid definitions is an impossible task. Mr. Justice Brennan, when speaking for the Court in the *Roth Case*, said:

> "This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process '[T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice * * *'."

In the *Roth Case* (*Supra*), this Court established a criterion by which obscenity may be judged.

> "* * * Whether to the average person, applying contemporary community standards, *the dominant theme of the material taken* as a whole appeals to the prurient interest." (Emphasis added.)

This test, almost verbatim, is embodied in section 122-a of the New York Education Law, the constitutionality of which the appellant now attacks:

> § 122-a "* * * the term 'immoral' * * * shall denote a motion picture film or part thereof, *the dominant purpose or effect of which is erotic or pornographic* * * *." (Emphasis added.)

It cannot be argued that a statute which so clearly meets the test set forth by this Court, is unconstitutional. Such

a test "provides safeguards adequate to withstand the charge of constitutional infirmity". (*Roth Case, Supra.*)

This Court has recognized the power of the State by the exertion of its police power to suppress obscenity.

> "There are certain well defined and narrowly limited classes of speech *the prevention and punishment* of which *have never been thought* to raise any constitutional problem." [*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571, 572, 86 L. Ed. 1031, 1035.]
>
> "In maintaining this guaranty [liberty of the press and speech], the authority of the State to enact laws to promote the health, safety, *morals* and general welfare of its people is necessarily admitted." (*Near* v. *Minnesota*, 283 U. S. 697, 707, 51 S. Ct. 625, 628) (Emphasis added.)

In upholding the constitutionality of the licensing statute, the New York Court of Appeals reaffirmed the State's "primary responsibility for the preservation of the basic morality of its people." The Court of Appeals refused "to confer a license to corrupt."

The basic morality of the people of this State is well known. The appellant had ample knowledge of the moral code which it seeks to ridicule and debase. Adultery is the sole ground for divorce in New York State [Civ. Prac. Act § 1147]; adultery is a crime in New York as in many states of the Union [Penal Law § 101]. As stated by Judge Conway in the opinion in the present case: "Indeed adultery has been decreed to be immoral since Moses received the Commandments on Mount Sinai."

CONCLUSION.

It is therefore submitted that, when analyzed, the questions which this Court is now being asked to review have all been heretofore determined; that there is no substantial constitutional question presented by this appeal entitling the appellant to invoke the jurisdiction of the Supreme Court of the United States. Wherefore appellees respectfully move that the within appeal be dismissed or that judgment be dismissed or that the judgment and decree of the Court of Appeals of the State of New York be affirmed.

Respectfully submitted,

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